COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	)	**D.T.E. 04-33**

OPPOSITION OF VERIZON MASSACHUSETTS TO PETITION FOR EMERGENCY DECLARATORY RELIEF

Verizon Massachusetts ("Verizon MA") hereby opposes the Petition for Emergency Declaratory Relief filed by a number of competitive carriers ("the CLECs") on March 4, 2005, seeking a Department order compelling Verizon to continue to accept new unbundled network element orders in direct violation of the Federal Communication Commission's *Triennial Review Remand Order ("TRRO").*[1]

INTRODUCTION

The FCC concluded in the *TRRO* that CLECs are not impaired without unbundled access to local circuit switching or, in some circumstances, high capacity loops and transport, and it set out a transition plan that halts new orders for these UNEs and phases out existing UNE arrangements over twelve months, or 18 months in the case of dark fiber. This mandatory transition plan "***does not permit*** competitive LECs to add new UNE-P arrangements using

[1] *Order On Remand, In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, 2005 FCC LEXIS 912 (Rel. Feb.4, 2005) ("TRRO").

unbundled access to local circuit switching" on or after March 11, 2005.[2] This immediately effective bar on new orders also applies to enterprise loops and dedicated transport facilities for which no impairment exists under the criteria established in the *TRRO*.[3] The "no-new-adds" directives in the new rules could not be clearer. For example, 47 CFR §51.319(e) (2)(ii)(C) states that ILECs need not provide DS1 transport as a UNE in the specified circumstances and then states that, "Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to [these rules], *requesting carriers may not obtain* new DS1 transport as unbundled network elements."[4]

The FCC's prohibition on new orders for delisted elements should come as no surprise to the CLECs. The *TRRO* follows years of federal litigation over the lawful scope of unbundling, and memorializes the FCC's December 2004 decision to eliminate UNE-P. Indeed, the FCC recognized last summer that the D.C. Circuit's mandate in *USTA-II* eliminated these UNEs, absent the FCC's *Interim Rules*, which extended access only to March 11, 2005.[5]

The CLECs seek to forestall the implementation of federal law and the inevitable transition away from the discontinued UNEs by claiming that their interconnection agreements ("ICAs") allow them the unilateral discretion to ignore the FCC's binding directive to cease placing new UNE orders as of March 11, 2005, unless and until the CLECs see fit to agree to a contract amendment to memorialize the simple fact that the CLECs "***may not obtain"*** new UNEs discontinued by the new federal rules. The CLECs' Petition is based on the extraordinary – and

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2 *Id.* ¶ 227 (emphasis added).

3 Id. ¶¶ 142 (transport), 195 (loops).

4 Emphasis added. *See also*, 47 CFR §51.319(a)(4)(ii), (5)(iii) and (6)(ii) (re loops); 47 CFR §51.319(d)(2)(iii) (re switching) and 47 CFR §51.319(e)(2) (iii)(C) and (iv)(B) (transport).

5 Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 FCC Rcd 16783 (FCC rel. Aug. 20, 2004) ("*Interim Rules Order*").

clearly mistaken – proposition that their interconnection agreements with Verizon override the explicit and unconditional directives by the FCC that carriers take specific action on a specific date. The CLECs' suggestion is wrong both as a matter of law ***and*** as matter of the interconnection agreements themselves.

The CLECs are wrong as a matter of law because the *TRRO*'s directive forbidding new orders for the discontinued UNEs is immediately effective and binding on Verizon and the CLECs irrespective of the terms of their interconnection agreements ("ICAs"). As the Supreme Court has stated, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign."[6] The existence of an interconnection agreement cannot deprive the FCC of jurisdiction to issue orders binding on carriers, especially where, as here, the order is part of mandatory transition regulations required to conform the FCC's rules to binding federal court decisions.[7] Even if the ICAs required some period of negotiation to effectuate an immediate change of law – which they clearly do not – such a term could not trump an immediately effective FCC directive. *See* Argument, Part I.

Second, despite the CLECs' rhetoric, Verizon is not "unilaterally" amending the Agreement or acting in violation of its terms. Indeed, though the CLECs base their entire petition on the allegation that the ICAs require Verizon to continue to provide the discontinued UNEs, they fail to cite to a single provision of any of their ICAs in support of their claim. This is not surprising given that the terms of the ICAs directly contradict the CLECs' claim of anticipatory breach. In fact, two of the petitioners – Broadview Networks, Inc. and Broadview

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6 *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982) (citing Veix v. *Sixth Ward Building & Loan Assn. of Newark*, 310 U.S. 32 (1940); *Home Building & Loan Assn*. v. *Blaisdell*, 290 U.S. 398 (1934).)

7 *See Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482, 55 L.Ed. 297, 303, 31 S.Ct. 265, 270 (1911) (finding it "inconceivable" that the exercise of the commerce power by federal authorities could be hampered or restricted to any extent by contracts previously made between individuals or corporations).

NP Acquisition Corp. – have no right to obtain the UNEs at issue here under their ICAs at all, even aside from the no-new-adds mandate. Two additional petitioners – BridgeCom International, Inc. and XO Communications, Inc. – don't even *have* interconnection agreements with Verizon MA. *See* Argument, Part II. Therefore, four of the seven petitioners lack standing to complain about implementation of the FCC's bar on new orders, and their claims of "immediate and irreparable injury" are necessarily false.

Third, the Department lacks authority to issue a stay of an FCC order and therefore cannot interpret the ICAs in a fashion that delays the explicit March 11 implementation date. Congress gave the FCC sole responsibility to make section 251 unbundling determinations. The FCC has exercised that jurisdiction in part by issuing its immediately effective no-new-orders directive. That directive can only be stayed by the FCC itself or by the D.C. Circuit, but the CLECs have not asked for a stay in either of those forums.[8] They may not collaterally challenge the FCC's Order before this Department.[9] *See* Argument, Part III.

Fourth, the CLECs' appeal to section 271 as grounds to stay the FCC's order is unavailing. Verizon has never refused to make available the network elements required by section 271 but which will no longer be available as UNEs under the new FCC rules. In any

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[8] 28 U.S.C. § 2342 ("The court of appeals … has ***exclusive jurisdiction*** to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission….") (emphasis added).

[9] Even if the Department had authority to override the clear requirements of federal law – and it does not – the CLECs are not entitled to the extraordinary injunctive relief they seek. They cannot show any likelihood of success on the merits. Not only does the *TRRO* foreclose their claim, but the Department has no record basis for imposing such an obligation. The equities likewise argue against injunctive relief. The CLECs don't even bother to make a showing of irreparable harm, making only the naked assertion, without elaboration and without a supporting declaration or affidavit, that they will suffer "immediate and irreparable injury" in the absence of relief. Petition at 2. Of course, Verizon has consistently offered to enter into a commercial agreement for services to replace the UNEs discontinued by the FCC, and the CLECs therefore have the ability to continue to order new switching, loop and transport services, albeit at just and reasonable rates. Thus, the only "harm" that may befall the CLECs as a result of compliance with the new federal rules is that they may have to pay more for services they now receive at TELRIC rates, but money damages alone cannot constitute irreparable harm under Massachusetts law. Further, the CLECs fail to acknowledge the conclusive determination of the FCC that continued imposition of UNE obligations would harm the public interest.

event, determination and enforcement of Verizon's section 271 obligations is the sole province of the FCC. See Argument, Part IV.

Because the CLECs are not entitled, under any theory, to ignore the clear directives of the FCC to desist from ordering new switching, loop or transport UNEs eliminated by the new rules, and because this Department cannot provide the CLECs the relief they seek, the Department must deny the Petition.

REGULATORY BACKGROUND

In response to the remand ordered by the D.C. Circuit in *USTA II*,[10] the FCC's *TRRO* found that competitors are ***not*** impaired and unbundling is ***not*** required for any local circuit switching or dark fiber loops, or for certain high-capacity loops or dedicated transport.[11] This determination by the FCC follows more than eight years of unlawful unbundling obligations imposed by rules repeatedly vacated by the Supreme Court and the D.C. Circuit. In deciding to eliminate these UNEs, the FCC balanced the costs and benefits of unbundling, to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition." *TRRO*, at ¶ 2. The resulting, affirmative prohibition on new UNE arrangements for these services is unambiguous and unconditional:

- "Incumbent LECs have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO ¶ 5.*
- The FCC's transition plan "***does not permit*** competitive LECs to add new switching UNEs." *Id.*
- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify ***a***

[10] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("USTA II"), *cert. denied sub nom. NARUC v. United States Telecom. Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[11] *TRRO* ¶¶ 5, 126, 129, 133, 174, 179, 182, 199, 204.

nationwide bar on such unbundling." *Id.* at ¶ 204.

- "[W]e find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine ***not to unbundle*** that network element…" *Id*. at ¶ 210.

- "We conclude that requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both if the wire centers are either Tier 1 or Tier 2 wire centers." *Id*. at ¶129

- "These transition plans … ***do not permit*** competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id*. at ¶ 142.

- "These transition plans … ***do not permit*** competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id*. at ¶195.

- "Competitive LECs are not impaired without access to dark fiber loops in any instance." *Id.* at ¶ 5 and 146.

- "With respect to dark fiber loops, we eliminate unbundling on a nationwide basis." *Id.* at ¶ 166.

And, as noted above, the rules themselves explicitly state that where an ILEC is not required to provide unbundled access to a given network element under the new rules, "requesting carriers may not obtain" that element as a UNE.[12]

The *TRRO* also imposes specific transition periods for moving the embedded base of delisted elements to alternative arrangements. Specifically, the FCC granted CLECs twelve months to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶ 199. The FCC reasoned that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* ¶ 227. The FCC likewise

[12] *See* Note 3, above.

imposed a 12-month period to transition discontinued UNE loops and transport.[13] For purpose of negotiating those follow-on arrangements, the FCC gave the parties up to twelve months "to modify their interconnection agreements, including completing any change of law processes."[14]

The FCC made clear, however, that the transition periods apply *only* to the "embedded customer base," but as of March 11, 2005, **"do not permit** competitive LECs to add new … UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists."[15]

ARGUMENT

I. The Parties' Interconnection Agreements Cannot Supersede the FCC's Mandatory Transition Plan.

The CLECs cannot use the "change of law" provisions of the parties' ICAs to delay indefinitely the start of the FCC's "no-new-adds" period for the UNEs eliminated in the *TRRO*. The FCC has the authority to issue immediately effective directives that supersede any "change-of-law" process under interconnection agreements, and it clearly did not intend that the start of the no-new-adds period should be subject to a lengthy change-of-law process. Instead, the FCC directed that new orders for the discontinued UNEs must cease as of a date certain – March 11, 2005 – with no exceptions.

The FCC has the authority to issue immediately binding transition rules to remedy the situation created by its repeated promulgation of unlawful unbundling rules. For more than eight years the FCC has required incumbent LECs to provide access to unbundled network elements

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[13] *See e.g.* 47 C.F.R. §§ 51.319(a)(4)(iii), 51.319(d)(2)(iii) and 51.319(e)(2)(ii)(c). The rules also provide for an 18-month transition period for dark fiber. Id. ¶¶ 144, 197.

[14] TRRO ¶¶ 143, 196, 227. The FCC also ruled that facilities no longer subject to unbundling would be subject to a true-up to the FCC's prescribed transitional rates, back to March 11, 2005, upon the amendment of the relevant interconnection agreements. *Id.* ¶¶ 145, 198 and 228.

[15] TRRO ¶142, 195; *see also, id.* ¶227.

despite the repeated *vacatur* of its UNE rules by the Supreme Court and the D.C. Circuit because of its repeated failure to issue lawful impairment findings under section 251(d)(2).[16] Under such circumstances, the FCC has broad authority to correct the consequences of its vacated UNE rules.[17]

The FCC was explicit that its transition plan is necessary to the proper effectuation of the Act's goals and avoidance of market disruption.[18] Central to that transition plan is the FCC's requirement that the CLECs eliminate their current embedded base of UNE arrangements by converting them to other arrangements within twelve months, or in the case of dark fiber, 18 months. The FCC has special discretion in adopting transition rules intended to smooth implementation of its new permanent rules.[19] The immediate no-new-adds directive is part of that transition. It would have made no sense for the FCC to permit CLECs to continue to add new UNEs to the embedded base at the same time as carriers are supposed to be reducing the embedded base to zero.[20]

Thus, not only is the no-new-add directive ***not*** conditioned on renegotiation of interconnection agreements, but the CLECs are not free to ignore or avoid it. The FCC could not have been clearer when it held that its transition plan "does not permit" CLECs to order additional UNEs at the same time they are supposed to be converting UNEs away.[21]

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16 *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388, 391 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-430 (D.C. Cir. 2002) ("*USTA I*");*USTA II*, 359 F.3d at 568.

17 *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals).

18 *TRRO* ¶ 235-236.

19 *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001).

20 *Id*.

21 *TRRO* ¶142, 195; *see also, id*. ¶227.

Indeed, March 11, 2005, was carefully selected as the beginning of the transition period to avoid having a period where no rules are in place, and the FCC clearly did not intend the start of the transition period to be delayed by any negotiations. The FCC adopted the *TRRO* in response to the D.C. Circuit's *vacatur* of UNE rules adopted in the *Triennial Review Order*. Between the *vacatur* and the promulgation of these new UNE rules, however, the FCC issued its *Interim Rules Order,* in which it recognized that ILECs would be "permitted under the court's holding in *USTA II*" to immediately cease providing the UNEs at issue here, including the substantial embedded base.[22] To preclude the disruption that such a sudden elimination of UNEs would cause while the FCC was undertaking its remand proceeding, the FCC's *Interim Rules Order* included an immediately effective rule preventing the "withdrawal of access to UNEs" notwithstanding the terms of any interconnection agreements.[23] But the *Interim Rules Order's* temporary directive to continue providing UNEs despite the absence of a lawful impairment finding expires on March 11, 2005.[24] As a result, the FCC wrote the *TRRO's* new UNE rules and transition arrangements in a manner to avoid a hiatus in which no unbundling rules at all would be in place. *TRRO,* ¶¶ 235-236, 250.

To prevent such a hiatus, however, the *TRRO's* new transition rules must go into effect immediately upon expiration of the *Interim Rules Order* on March 11, 2005. Just as the obligations imposed on ILECs in the *Interim Rules Order* were immediately effective without a contract amendment, the *TRRO's* new transition rules, including the prohibition on adding new

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22 *Interim Rules Order* ¶ 17.

23 *Id.* ¶ 26.

24 *Id.* ¶ 21.

UNE-P arrangements, must also be immediately binding to avoid a situation in which no effective FCC rules apply. [25]

The CLECs' contention that the change-of-law provisions of the ICAs are implicated by the FCC's ban on new UNEs is thus beside the point. The ICAs cannot exempt carriers from complying with an explicit directive of federal law. The CLECs claim that "the only lawful way that Verizon may modify its rights with respect to the provision of UNEs and UNE combinations is by amending its interconnection agreements," Petition at 5, and that Verizon would breach its ICAs by refusing to provision UNEs eliminated by the federal rules unless it first "compl[ies] with the change of law procedures established by the Agreements." Petition at 2. But the FCC understood that existing interconnection agreements often contain "change of law" provisions. It specifically contemplated, for example, that the embedded base transition would involve the change of law process – and it allowed twelve or eighteen months as a consequence. Had the FCC intended that the *entire* transition occur through such a lengthy process, however, it could have just made its new impairment findings and left it at that – much like it did in the *TRO*. Instead, the FCC explicitly directed that CLECs "***may not obtain***" new switching, loop or transport UNEs eliminated by the new rules as of a ***date certain***, March 11, 2005 – with no exceptions.[26]

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[25] The CLECs are profoundly mistaken in their assumption that, if they successfully delay the application of the *TRRO*'s transitional rules, the parties will revert to a situation in which the CLECs may continue adding new UNEs to their embedded base. Instead, with the termination of the *Interim Rules Order*'s temporary preservation of UNEs after March 10, 2005, no FCC unbundling rules would apply and the parties would simply revert to the *USTA II* mandate, which would allow the immediate termination of all switching, loop and transport UNE arrangements, as the FCC itself recognized in the *Interim Rules Order*.

[26] The TRRO is definitive in its ban on new UNE-Ps. Therefore, its statement that CLECs are "not permit[ted] … to add new UNE-P arrangements …except as otherwise specified in this Order" (TRRO, ¶ 227) refers to the option left to carriers to enter into voluntary commercial agreements that might continue the availability of UNE-P-like services.

The CLECs' position boils down to a simple refusal to follow that binding and pre-emptive directive – which is, of course, the result if the CLECs' delay their compliance past March 11, 2005. Their claim that negotiation, arbitration and amendment must precede compliance with the directive is *automatically* such a refusal because those processes obviously cannot be completed by March 11. It is in effect a claim that the effective date ordered by the FCC is subject to the CLECs' veto – which of course it is not.

No provision of the *TRRO* purports to make the section 252 contract amendment process a *precondition* to compliance with its mandates. For that incorrect proposition, the CLECs rely solely on *TRRO* ¶233, which states in part that:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

That general direction to the parties to revise their contracts where necessary as a result of the new rules neither limits implementation of the *TRRO* to the section 252 amendment process nor negates the *TRRO's* specific directives, including the no-new-adds prohibition. *See, e.g.*, ¶227.

First, and contrary to the CLECs' contention, not *everything* in the *TRRO* is subject to negotiation. Although the FCC contemplated in *TRRO* ¶233 that carriers would negotiate arrangements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements, to work out operational details of the transition of the embedded base), no negotiation is required to implement the immediate no-new-

add directive included in the transition rules.[27] The FCC held that its transition regime "does not permit" any additional unbundling of those elements subject to that regime "pursuant to section 251(c)(3)." *TRRO* ¶¶ 142, 195, 227. Unbundling "pursuant to section 251(c)(3)" *means* unbundling pursuant to existing 1996 Act interconnection agreements. *See* 47 U.S.C. § 251(c)(3) (describing incumbent LECs' obligation "to provide . . . access to network elements on an unbundled basis . . . in accordance with the terms and conditions of the [interconnection] agreement"); *id.* § 251(c)(1) (describing carriers' obligation to negotiate "terms and conditions of agreements to fulfill the duties described" in section 251(b) and (c)).[28] The FCC permitted carriers to negotiate alternative arrangements to supersede the surcharges and mandatory migration of the embedded base provided for under the transition rules, and it preserved "commercial arrangements carriers have reached" for continued provision of wholesale facilities. *TRRO* ¶¶ 145, 198, 228. But the FCC established no exceptions to the rule that mandatory unbundling of new UNE-P arrangements and high capacity facilities not subject to unbundling under section 251(c)(3) must cease as of March 11, 2005.

Moreover, in light of the FCC's findings that continued availability of UNE-P, for example, would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition" (*Id.* ¶ 218), it makes no sense to suggest that those harms should be suffered for so long as the parties take to amend their agreements. Nor would it make sense for the FCC to have ruled that "requesting carriers may not obtain" new arrangements of the discontinued UNEs as of March 11, 2005, but then to have given carriers 12 months to

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[27] Similarly, at the end of the 12-month transition period, incumbent LECs have no further obligation to provide access to UNE-P or high-capacity facilities that are no longer subject to unbundling, even at the transitional rate. *See TRRO* ¶¶ 145, 198, 228 (noting that the "limited duration of the transition" protects incumbents).

[28] Thus the CLECs' claim (Petition at 5) that "The 1996 Act is, put simply, built on rights and obligations set forth in interconnection agreements." has it exactly backwards. The parties' interconnection agreements are built on the rights and obligations set forth in the Act, as implemented by the FCC's rules.

complete an amendment before they would be bound by that prohibition, as the CLECs argue it did. Obviously, the FCC's bar on new orders as of March 11, 2005, would be meaningless if it could not be implemented until March 11, 2006.

II. The CLECs' Claims Are Contrary to the Plain Terms of Their Interconnection Agreements, Which Require Compliance With Federal Law.

Even if the CLECs had a plausible argument that their ICAs could somehow trump explicit FCC prohibitions – and they do not – the ICAs, in fact, do not support their position. Contrary to the CLECs' accusations, Verizon is neither violating nor "unilaterally" amending the agreement, but complying with both its terms and the clear command of the FCC.

First, as noted above, two of the petitioners here – BridgeCom International, Inc. and XO Communications, Inc. – are not even parties to interconnection agreements with Verizon MA. Obviously, they cannot claim a breach of non-existent contracts, and they had no right to join in the Petition.

Second, two other CLEC Petitioners – Broadview Networks, Inc. and Broadview NP Acquisition Corp. – are parties to ICAs by way of adoption of an ICA between Verizon MA and another carrier. In both cases, the parties agreed to the respective adoptions upon the following condition:

> For avoidance of doubt, adoption of the Terms does not include adoption of any provision imposing an unbundling obligation on Verizon that no longer applies to Verizon under the Report and Order and Order on Remand (FCC 03-36) released by the Federal Communications Commission ("FCC") on August 21, 2003 in CC Docket Nos. 01-338, 96-98, 98-147 ("Triennial Review Order"), the decision of the U.S. Court of Appeals for the D.C. Circuit in its Opinion and Order in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), or that is otherwise not required by both 47 U.S.C. Section 251(c)(3) and 47 C.F.R. Part 51.[29]

[29] *See* Letter Agreement dated November 11, 2004, from John C. Peterson, Verizon New England Inc. d/b/a Verizon Massachusetts, to Eric G. Roden, Broadview NP Acquisition Corp., ¶1.B and Letter Agreement dated

Of course, the obligations to provide the UNEs at issue here – mass market switching, high capacity loops and dedicated transport – are precisely those that the *USTA II* court vacated, and the FCC has found that these UNEs are not required by Section 251(c)(3) and Part 51 of the FCC's Rules. Accordingly, neither Broadview NP nor Broadview Networks has any contractual right to obtain any of these UNEs under the explicit terms of their existing ICAs.

Third, a number of the ICAs at issue here require both parties to *comply* with FCC directives. For example, the two Broadview agreements and the DSCI agreement all provide as follows:

> 4.2 Each Party shall remain in compliance with Applicable Law in the course of performing this Agreement.
>
> 4.3 Neither Party shall be liable for any delay or failure in performance by it that results from requirements of Applicable Law, or acts or failures to act of any governmental entity or official.
>
> 2.8 (Glossary) Applicable Law. All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

As of March 11, the TRRO and the new federal unbundling regulations will obviously fall within the contracts' definition of Applicable Law, so under §4.2, the parties have agreed that they "shall remain in compliance" with the TRRO and the new rules.[30] In addition, §4.3 shields

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November 11, 2004, from John C. Peterson, Verizon New England Inc. d/b/a Verizon Massachusetts, to Eric G. Roden, Broadview Networks, Inc., ¶1.B.

[30] The CLECs miss the point in asserting that "'Applicable law' includes, at the very least, Verizon's obligations under the Bell Atlantic-GTE merger conditions, under Section 271 of the 1996 Act, and under state law." Petition at 7. Whether these other sources of law are included in Applicable Law is immaterial, because the TRRO and the FCC's rules inarguably *are* included in applicable Law, and therefore govern the interconnection agreement. In any event, the other sources of law cited by the CLECs do not fall within the ambit of the ICAs. As demonstrated in Part III, below, the Department is preempted from creating UNEs under state law to replace those eliminated by the FCC based on its findings of no impairment. Second, the Department has already determined "that Verizon's obligation to provide UNEs pursuant to the terms of the Bell Atlantic/GTE Merger Conditions expired no later than 30 days after publication of the *Triennial Review Order*." Consolidated Order entered in DTE 03-60 and 04-73 on December 15, 2004 ("Consolidated Order") at 48. Finally, interconnection agreements implement legal obligations under section 251, not section 271,

Verizon from any liability for any failure to perform resulting from its compliance with the new rules prohibiting CLECs from obtaining the discontinued UNEs as of March 11. In a similar vein, §20.2.1 of the XO Massachusetts ICA provides that, "Each Party shall comply with all federal, state, and local laws, rules, and regulations applicable to the subject matter of its performance under this Agreement." Consequently, these CLECs have no viable claim that Verizon would breach its ICA by failing to provide the UNEs banned by the new FCC rules as of March 11.[31]

Fourth, three of the ICAs at issue here allow Verizon to discontinue the provision of any UNE (even in the embedded base) upon 30 days' notice "if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide" such UNE.[32] The CLECs acknowledge in the Petition, at 3, that they had actual notice by February 10, 2005, of Verizon's intent not to accept orders for the UNEs discontinued by the new FCC rules as of March 11.[33] Thus Verizon will have provided the notice required by the ICAs and would not breach those agreements by rejecting new orders after March 11, even absent the FCC's mandate to implement the no-new-adds prohibition as of that date.

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merger conditions, or state law. *Verizon Md., Inc. v. Global NAPs, Inc*., 377 F.3d 355, 364 (4th Cir. 2004) (quotations omitted); *see also BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc*., 317 F.3d 1270, 1278 (11th Cir. 2003) (en banc). Section 251(c)(1) of the Act limits the duty to negotiate to the duties described in § 251(b)(1)-(5) and § 251(c). As the Fifth Circuit has confirmed, an incumbent LEC cannot be forced to negotiate matters outside its obligations under section 251. *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482, 487 (5th Cir. 2003). In any event, the CLECs cite no language in their ICAs that would require Verizon to provision network elements required to be made available solely by section 271.

[31] The parties' intention to condition their performance on compliance with law permeates the ICAs. *See, e.g*., XO Massachusetts Agreement, Attachment III, §1, stating in part that Verizon "shall provide unbundled Network Elements in accordance with this Agreement and appropriate Commonwealth and Federal Rules and Regulations." See also, A.R.C. Agreement, §27.1 stating that "Each Party shall remain in compliance with Applicable Law in the course of performing this Agreement."

[32] Agreements of DSCI, Broadview NP and Broadview Networks, §4.7.

[33] Verizon posted the notice on its website on February 10, 2005, and mailed copies to CLECs that day.

Finally, even the "change of law" provisions of the ICAs, so heavily relied on by the CLECs, recognize that the parties will ***first*** comply with legal commands, and ***then***, if necessary, conform their agreement to those commands. For example, the ICA of XO Massachusetts (which adopts an MCI agreement), provides that:

> 8.2 In the event the FCC or the Department promulgates rules or regulations, or issues orders, or a court of competent jurisdiction issues orders, which make unlawful any provision of this Agreement, or which materially reduce or alter the services required by statute or regulations and embodied in this Agreement, ***then*** the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which conform to such rules, regulations or orders. *In the event the Parties cannot agree on an amendment within thirty (30) days* ***after the date any such rules, regulations or orders become effective***, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 24 (Dispute Resolution Procedures) hereof.

And,

> 8.3 In the event that any legally effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of MCIm or BA to perform any material terms of this Agreement, MCIm or Bell Atlantic may, on thirty (30) days written notice *(delivered not later than thirty (30) days* ***following the date on which such action has become legally binding or has otherwise become legally effective****)* require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required.

(Emphasis added.) This agreement thus contemplates the situation in which an FCC rule -- effective on a certain date – affects the terms of the agreement or the ability of the parties to perform. Nothing in these paragraphs suggests that negotiation or amendment somehow delays the effectiveness of binding law. To the contrary, these sections make clear that XO cannot ignore the *TRRO's* command, but that XO may seek to renegotiate the terms of the Agreement to bring it into conformance with the law ***after the effective date on which the command goes into***

effect.[34] These provisions stand for the obvious proposition that the parties will comply with an effective FCC order and then afterwards "conform" their contracts as necessary.

In contrast to the CLECs' interpretation, their interconnection agreements are clear that they are not entitled to obtain the UNEs eliminated by the FCC's new rules as of March 11. These agreements cannot be read to allow the CLECs – or require Verizon – to ignore the FCC's ban on new UNE arrangements as of March 11, 2005.[35]

III. The Department May Not Stay an FCC Order.

Any decision by the Department that stymied Verizon's efforts to comply with the clear directives of the FCC would be an attempt to stay the *TRRO.* It is absolutely clear that Department has no authority to do so.

The FCC's prohibitions on new UNEs are not subject to collateral challenge before the Department. Congress' passage of the Act has "unquestionably" taken "regulation of local telecommunications competition away from the states" as to all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *see also id.* at 397. In section 251(d)(2), Congress specifically "charged the [FCC] with identifying" which network elements are to be unbundled. *USTA I,* 290 F.3d at 422. States are not free to "impose any

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[34] The DSCI and Broadview agreements similarly provide in §4.6 that the parties will renegotiate the agreement in the event of a change of law that materially affects the rights or obligations of the parties, and that, "If *within thirty (30) days of the effective date of such decision, determination, action or change,* the parties are unable to agree in writing upon mutually acceptable provisions," then the parties may pursue other remedies. (Emphasis added).

[35] Rolled into their contract argument, the CLECs devote much space to complaining that the wire center lists that Verizon prepared in response to an FCC request and posted on Verizon's website are presented as "conclusive" proof of non-impairment in connection with the provisions of ¶234 of the *TRRO*. *See* Petition at 7-9. But, as Verizon MA explained in its recent Reply to Comments of CLECs Regarding Proposed Tariff Revisions dated March 3, 2005, at 10-11, those lists are not conclusive, even though the FCC clearly intends that the lists, filed with the FCC and developed following the FCC's instructions, are presumptively correct. *See* TRRO ¶¶ 100, 105. In any event, any "reasonably diligent inquiry" (TRRO, ¶ 234) by a CLEC into its entitlement to order certain loop or transport facilities must take into account Verizon's wire center lists. Contrary to the CLECs' vague suggestions, Verizon's publication of its wire center lists does not exceed Verizon's "authority" under the new rules or violate any term of the parties' interconnection agreements.

unbundling framework they deem proper under state law, without regard to the federal regime." *Triennial Review Order ("TRO"),* ¶ 192. In deciding to eliminate certain UNEs in the *TRRO,* the FCC balanced the costs and benefits of unbundling, to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition." *TRRO*, at ¶ 2. Any other balance struck by the Department would necessarily conflict with the FCC's decision, would substantially impair implementation of the Act and, therefore, would be preempted. As the Department ruled in its Consolidated Order in DTE 03-60 and 04-73, "Where the FCC has found affirmatively that CLECs are 'not impaired' and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation." Consolidated Order, at 23, n. 17. Any decision by the Department allowing CLECs to continue to obtain the discontinued UNEs on or after March 11 would necessarily rest on a finding of impairment, and would be preempted.

In any case, to the extent the CLECs wish to challenge the *TRRO,* they must do so before the FCC or the D.C. Circuit. Only the FCC itself or a federal court of appeals has jurisdiction to stay the action of the FCC. *See* 28 U.S.C. § 2349 ("Hobbs Act"); 47 U.S.C. § 405. More specifically, the FCC issued its prohibition of the discontinued UNEs on remand and in response to the D.C. Circuit's mandate in *USTA II.* Under the Hobbs Act, only a federal court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of…[the FCC's] final orders." 28 U.S.C. § 2342. This Department thus lacks the authority to interfere in any way with implementation of those rules.

IV. Verizon's Obligations Under Section 271 of The Act Afford No Basis for Staying the FCC's New Unbundling Rules.

In a final effort to provide the Department some excuse for extending the CLECs' access to the unlawful UNE arrangements barred by the FCC, the CLECs appeal to Verizon's obligation to make certain network elements available under section 271 of the Act. The CLECs' reliance on section 271 is misplaced. First, Verizon has in no way breached or stated an intention to breach its section 271 obligations. On the contrary, it has consistently stated its willingness to enter into individually-negotiated commercial agreements to provision network elements required by section 271 but no longer required to be unbundled under section 251. *See e.g.* Reply of Verizon Massachusetts to Comments of CLECs Regarding Proposed Tariff Revisions, n. 3 at 2. The CLECs even acknowledge that the proper standard for rates under such agreements is the FCC's "just and reasonable" standard, not TELRIC. Petition at 11. In the absence of a breach of Verizon's section 271 obligations, the CLECs have no cognizable claim here.

The CLECs ask the Department to enforce the market-opening provisions of section 271, asserting simply that, "As a condition of continuing to provide in-region interLATA services in Massachusetts, Verizon must continue to offer CLECs unbundled high-capacity DS1 and DS3 loops, dedicated transport, and local switching and UNE-P and cannot be permitted to circumvent that obligation as it proposes." Petition at 12. Of course, both the FCC and the Department have found that interpretation and enforcement of section 271 is the exclusive province of the FCC.[36] The Department has previously acknowledged that, "we do not have the

[36] The FCC has held that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*, at ¶¶ 17-18 (emphases added). Courts have likewise held that "Congress has clearly charged the FCC,

authority to determine whether Verizon is complying with its obligations under Section 271. 47 U.S.C. § 271(d)(6)."[37]

CONCLUSION

For all of the foregoing reasons, the Department should reject the CLECs' attempt to compel Verizon to provide new UNE arrangements in direct contravention of the new FCC rules on or after March 11, 2005.

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Dated: March 9, 2005

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and *not the State commissions*," with assessing Bell Operating Companies' compliance with section 271. *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998)(emphasis added); *see also AT&T Corp. v. FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000). And the text of Section 271 is replete with references to the FCC's duties. 47 U.S.C. § 271(d)(3), (4), (6). In addition, the CLECs' claim that UNE-P is mandated by section 271 is incorrect. The Department has ruled that "Verizon is not required to offer UNE-P under Section 271." Consolidated Order, at 55.

[37] Consolidated Order, at 56. *See also id.* at 71 ("[C]ompliance with Section 271 is for the FCC to decide").